

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

ALAMO GROUP (SMC) INC.

Employer

and

MARTY BARBER

Petitioner

and

UNITED ELECTRICAL, RADIO AND MACHINE
WORKERS OF AMERICA (UE) and its LOCAL 1128¹

Union

Case 18-RD-2491

DECISION AND ORDER

Petitioner seeks an election to determine whether certain employees of the Employer wish to continue to be represented by the Union. Petitioner, Employer and Union agree on the unit description. However, the Union contends that further processing of this petition is barred because it has a contract with the Employer. The Employer and Petitioner contend there is no contract bar. After reviewing the record, I conclude that the Employer and Union have a contract that bars further processing of this petition. Therefore, the petition is dismissed.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The Union's name appears as amended at the hearing.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The first section of this decision is a review of Board law regarding contract bar. The second section analyzes the evidence – which is not in dispute – revealed by the record. Finally, I will explain my conclusion that further processing of this petition is barred by a contract between the Employer and Union.

STATEMENT OF THE LAW

The Adequacy of the Contract

In order for an agreement to serve as a bar to an election, it must satisfy certain substantive and formal requirements which have been well established by Board case law. In Appalachian Shale Products Co., 121 NLRB 1160 (1958), the seminal case setting forth these requirements, the Board held that to constitute a bar to an election, an agreement containing substantial terms and conditions of employment sufficient to stabilize the parties' relationship must be signed by the parties prior to the filing of the petition. The agreement need not be a formal document. Rather, an informal document or series of documents, such as a written

² The Employer, Alamo Group (SMC) Inc., is a Nevada corporation with a facility in Sioux Falls, South Dakota, where it is engaged in manufacturing attachments for tractors. During the past 12 months, a representative period of time, the Employer sold products valued in excess of \$50,000 which were shipped to its Sioux Falls, South Dakota facility directly from suppliers located outside the State of South Dakota.

proposal and written acceptance, which nonetheless contain substantial terms and conditions of employment, are sufficient, if signed. Seton Medical Center, 317 NLRB 87 (1995); USM Corp., 256 NLRB 996 (1981). It is also immaterial that the contract does not take the form of a single self-contained document. Canon Boiler Works, 304 NLRB 457 (1991); Television Station WVTV, 250 NLRB 198 (1980). It is also clear that if the parties place their initials on the agreement, the initials are sufficient for contract bar purposes in certain circumstances, even though it is understood that the parties will formally execute the contract at a later date. Television Station WVTV, supra; Georgia Purchasing, Inc., 230 NLRB 1174 (1977); The Bendix Corporation, Process Instruments Division, 210 NLRB 1026 (1974). Finally, in representation cases, the Board has consistently limited its inquiry to the four corners of the document or documents alleged to bar an election and has excluded the consideration of extrinsic evidence. United Health Care Services, 326 NLRB 1379 (1998); Union Fish Co., 156 NLRB 187, 191-192 (1965).

The “Insulated Period”

A significant element in contract-bar policy is the concept of the “insulated period.” Parties to a contract are provided a 60-day period immediately preceding and including the expiration date of a contract for the negotiation and execution of a new contract. This rule was first set forth by the Board in Deluxe Metal Furniture Co., 121 NLRB 995 (1958). The rule holds that petitions filed during the 60-day (or other applicable) period immediately preceding and including the expiration date of an existing contract are dismissed. The effect of the rule is to require all petitioners to file petitions at least 61 days before the contract’s termination date or undergo the risk that a contract executed during the 60-day insulated period will foreclose the filing of a petition. The Board has further limited the filing of such petitions to a 60-90 day

window period prior to expiration of the contract. Leonard Wholesale Meats, Inc., 136 NLRB 1000, 1001 (1962). This 60-90 day window period remains the rule for employers not involved in health care. It appears, however, that in some circumstances the Board will allow the processing of a petition filed outside the 60-90 day window period where the petitioning employee relied on erroneous advice by an NLRB agent, and filed a petition outside the allowed period. Vanity Fair Mills, 256 NLRB 1104 (1972).

THE RECORD EVIDENCE

The evidence is not in dispute. The Employer has about 130 bargaining unit employees. The most recent contract between the Employer and Union (excluding the one in dispute) was effective from April 23, 2001 through April 23, 2004. The Union, Employer and Petitioner agree that this contract expired at 11:59 p.m. on April 23.

Negotiations for a successor contract to the 2001-2004 agreement commenced in March 2004. The final negotiation session was held on Friday, April 23, 2004. By about 2:00 p.m. on April 23 the Union and Employer reached agreement on a contract. In evidence is a copy of the agreement, which states on the first page that it is effective for the period from April 24, 2004 through April 30, 2006. The copy in evidence includes 35 numbered pages, and two unnumbered pages at the end which constitute the wage rates for various labor grades for each year of the contract. This agreement contains the initials of representatives for both the Employer and Union on the first page of the agreement. The parties did not formally execute this agreement on April 23. Also in evidence are two letters or memoranda from the Employer (and signed by the General Manager Shawn Cleary) to the Union, both also dated April 23. One of these documents is one page and explains the timing of economic changes, and the other is one page and explains the Employer's agreement with regard to termination of the existing

pension and 401K plans. Finally, also in evidence is a document dated April 23, 2004 and signed by representatives from both the Union and Employer, which states as follows:

Company agrees to verbal approval until Monday, April 26, 2004 at 9:00 AM for the ability of the Union Local 1128 to seek ratification of the Union contract. If past that time, Company considers the contract to be null and void.

Both the Employer and Union agree that the Union held its ratification vote on the afternoon of April 24, and that the Union representative telephoned the Employer that same afternoon and advised the Employer the contract had been ratified. On April 28, 2004, the parties formally executed the agreement reached on April 23, 2004.

The record also reveals that on April 23, 2004, Petitioner contacted Region 18's office and spoke to a female Board Agent whose name he does not recall. He advised the Board Agent that he wanted to file a decertification petition. He also told the Board Agent that the existing contract expired at midnight on April 23. The Board Agent advised Petitioner that he could not fax the decertification petition to Region 18's office that day because he had to wait until the contract expired. The Board Agent advised Petitioner to fax it in after midnight.

Petitioner faxed the decertification petition to Region 18's office on April 24, which was a Saturday. According to the petition, it was faxed at 10:44 a.m. The petition reveals that the Region docketed the petition on the following Monday, as the petition states that it was filed on April 26, 2004. The Employer and Petitioner agree that Petitioner did not provide the Employer with a copy of the petition prior to April 26, and General Manager Cleary testified that he first learned of the petition when Region 18 faxed it to the Employer.

Petitioner further contends that earlier in the year 2004 he was misled by an unidentified Board Agent employed by Region 18 regarding the filing of a decertification petition. According to Petitioner, he spoke to a male Board Agent, whose name he does not recall, who

advised him that he had to wait until 30 days before the contract expired in order to file a decertification petition. According to Petitioner, he again contacted Region 18's office on February 27, 2004, and spoke to a third Board Agent, whom Petitioner identified by name at the hearing. This third Board Agent then advised him that it was too late to file a petition, and he would have to wait until the contract expired. The third Board Agent also sent Petitioner a letter dated February 27 confirming their conversation.³

Contrary to the Employer's argument in its post-hearing brief, a key issue that is hopelessly confused is when Petitioner spoke with the unidentified male Board Agent who allegedly misled Petitioner on when he could file a decertification petition. Initially Petitioner testified that he "probably" had this conversation about 90 days prior to the party's agreement to a new contract. Later he said it was 3-4 days before the 90 days before the contract expired. Assuming this testimony was correct, that would mean Petitioner spoke with the unidentified male Board Agent sometime before January 24, 2004. However, later in his testimony, Petitioner testified that he spoke to the unidentified male Board Agent around February 24 or 25, just days before he spoke to Board Agent Myers. In addition, Petitioner's explanations of why he contacted Region 18 on February 27 are inconsistent. First, he testified that he called on February 27 because the contract between the Employer and Union would be expiring about 30 days later. However, when it was pointed out to Petitioner that this explanation made no sense (because as of February 27 there was still in excess of 50 days before the contract expired), Petitioner then testified that he made the contact on February 27 because someone suggested to

³ In its post-hearing brief, the Employer contends that Petitioner was uncertain about the date he spoke to the third Board Agent whom he identified by name. On the contrary, Petitioner was very clear in his testimony that he spoke to the named third Board Agent on February 27, 2004.

him that the information he had been given earlier by the unidentified male Board Agent was incorrect.

CONCLUSION

I conclude that the agreement between the Union and Employer on April 23 satisfies the Board's requirements as set forth above, and is an adequate contract to constitute a bar. The April 23 agreement is formal insofar as it is a complete contract. The April 23 agreement contains not only the substantial terms and conditions of employment – it contains the entire agreement between the Employer and Union. Moreover, the cover page of the April 23 agreement contains the handwritten initials of representatives from both parties and those representatives dated their initials with the date April 23. Finally, an additional document executed by the Employer and Union on April 23 makes clear that the April 23 agreement took effect on April 24 and would be null and void only if Union members failed to ratify the agreement. Union members did ratify the agreement on April 24 and the Employer was notified of the ratification. Thus, I conclude that the agreement is sufficient under the Board's contract bar rules, as described in the cases cited above.

I also conclude that even if ratification was a prerequisite to agreement between the Union and Employer, the agreement was in fact ratified and the Employer was notified of ratification on April 24, 2004. A contract executed on the same day that a petition is filed with the Board bars an election provided that the contract is effective immediately or retroactively, and the Employer did not have actual notice at the time of execution that a petition has been filed. Deluxe Metal Furniture Company, 121 NLRB 995, 999 (1958). It is clear in this case that the Employer did not have actual notice that the petition was filed until April 26, 2004. Therefore, even assuming that Petitioner filed this petition on April 24, and even assuming that

ratification was a prerequisite to agreement, the parties' new agreement bars further processing of this petition. However, I also note that the precise wording of the agreement regarding ratification is that the agreement was effective on April 24 and if not ratified, then it was invalid on April 26.

A final issue relates to whether members of the Region 18 staff misled Petitioner regarding the filing of this petition. I conclude that the evidence is insufficient to establish that Petitioner relied on erroneous advice in filing his petition. First, there is no question that the unidentified female Board Agent correctly advised Petitioner on April 23 that he could not file his petition until after expiration of the contract. That advice is consistent with Board law regarding the insulated period. Second, Petitioner's testimony regarding advice given by an unidentified male Board Agent is clearly inconsistent. He placed the date of this conversation at two different times – either around January 20 or around February 24 or 25, and at the end of his testimony he appeared to believe the conversation occurred around February 24 or 25. The problem presented by Petitioner's inconsistent testimony is that if the conversation occurred around February 24 or 25, Petitioner was already too late to file his petition, because the 60-90 day window period for filing a petition for a contract expiring on April 23 was from January 24 through February 22. In that event, Petitioner could not have filed his petition until after the contract expired, no matter what the unidentified male Board Agent is alleged to have told Petitioner. Therefore, the record provides no objective basis for concluding that the allegedly incorrect advice was provided at a time when Petitioner could have timely filed a decertification petition. Thus, I conclude that the Petitioner and Employer have failed to establish that the Petitioner relied to his detriment on any erroneous or misleading information provided by the Region.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it is, dismissed.⁴

Signed at Minneapolis, Minnesota, this 17th day of May, 2004.

/s/ Marlin O. Osthus

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⁴ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 –14th Street, N.W. Washington, D.C. 20570. This request must be received by the Board in Washington by **June 1, 2004**.